



**STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES**

Bill J. Crouch
Cabinet Secretary

**Bureau for Medical Services
Legal and Regulatory Services**
350 Capitol Street – Room 251
Charleston, West Virginia 25301-3706
Telephone: (304) 558-1700 Fax: (304) 558-1451

Cynthia E. Beane
Commissioner

January 14, 2019

Sent Via Electronic Mail:
ebaumwell@acluwv.org

Eli Baumwell
ACLU of WV Foundation
P.O. Box 3952
Charleston, WV 25339-3952

Mr. Baumwell,

On December 3, 2018, the West Virginia Department of Health and Human Resources, Bureau for Medical Services (BMS) received via your request pursuant to the Freedom of Information ACT ("FOIA"), W.Va. Code §29B-1-1 *et seq.* requesting:

1. Any rule, policy, or guidance governing Medicaid funds for pregnancy terminations, prior to, and after the passage of the No Constitutional Right to Abortion Amendment ("Amendment 1")
2. The code, rules and internal regulations, policy, and guidance governing rule changes, including rule changes by ballot initiative and by court order.
3. Any memoranda or communications regarding the changes to rules, policies, or guidance following the ruling in *Women's Health Center v. Panepinto* (446 SE 2d 658, 1993).
4. Any memoranda or communications regarding the manner and timeframe for changing rules, policies, or guidance regarding Medicaid funds for pregnancy termination.
5. Any legal memoranda, opinions, or findings that support an immediate revival of W. Va. Code § 9-2-11 following the passage of Amendment 1.
6. Any communications with legislators, legislative staff, the Governor, or Governor's staff regarding:
 - a) Medicaid funds for pregnancy termination services,
 - b) Senate Joint Resolution 12 (2018).
 - c) W.Va. Code § 9-2-11.
 - d) Amendment 1, or
 - e) The revival of statutes.

Eli Baumwell
RE: FOIA

Page 2 of 2

7. Any communications with outside lobbyists or special interest groups regarding the implementation of Amendment 1 and the revival of W.Va. Code § 9-2-11.

After reviewing its records, and in addition to the previously submitted response, BMS has found the attached documents responsive to your request.

The responsibilities of this office with respect to your request are now at an end. You are advised that FOIA affords you the opportunity to seek injunctive or declaratory relief in the Circuit Court of Kanawha County. If you have any questions, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read 'RJR', is written over the typed name.

Riley J. Romeo, Jr., Esq.
Deputy General Counsel
Bureau for Medical Services

RJR/as

Garnes, Debra G

From: Signore, Angela D
Sent: Monday, January 14, 2019 4:13 PM
To: ebaumwell@acluwv.org
Subject: FOIA Request
Attachments: Scan.pdf; Baumwell_FOIA_20190114.pdf

Importance: High

Mr. Baumwell,

Per our conversation on December 14, 2018, and in addition to the previously submitted response, BMS has found the attached additional documents responsive to your request.

The responsibilities of this office with respect to your request are now at an end. You are advised that FOIA affords you the opportunity to seek injunctive or declaratory relief in the Circuit Court of Kanawha County. If you have any questions, please do not hesitate to contact me.

If you have any further questions, please feel free to contact me at the number listed below.

Thanks,

Angela Signore

West Virginia Department of Health & Human Resources
Bureau for Medical Services
Office of Legal and Regulatory Services
350 Capitol Street, Room 251
Charleston, WV 25301-3707
PHONE (304) 558-1700
FAX (304) 558-1509



November 28, 2018

Mr. Tony Atkins
Deputy Commissioner, Finance & Administration
WV Bureau for Medical Services
350 Capitol Street
Charleston, West Virginia 25301

VIA Certified Mail

RE: Revised Public Notice Regarding WV Constitutional Amendment 1

Dear Deputy Commissioner Atkins:

This letter is in follow up to the Revised Public Notice referenced above, dated November 13, 2018, and received via e-mail from your office that same date, and seeks to clarify and confirm the extent to which such Public Notice applies to the services provided by Women's Health Center of West Virginia.

Please be advised that, in accordance with the Revised Public Notice from the West Virginia Bureau for Medical Services that Medicaid reimbursement for pregnancy termination ceased, effective November 6, 2018, at 7:30 p.m. upon passage of Amendment 1, the Women's Health Center of West Virginia will cease billing Medicaid for pregnancy termination services, CPT code 59840, that occurred after the Amendment's effective date [other than termination of pregnancy services that comply with any of three limited circumstances delineated in the Revised Public Notice and consistent with WV Code Section 9-2-11].

As you are most likely aware, the Women's Health Center of West Virginia provides a broad array of women's reproductive health services and gynecological care, other than termination of pregnancy services, to its patients, a majority of whom would otherwise be medically underserved.

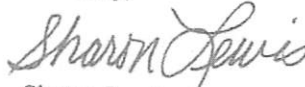
The Women's Health Center of West Virginia intends to continue to bill Medicaid and the Medicaid managed care organizations, as appropriate, for gynecological and obstetric health services provided to pregnant women and women seeking reproductive health services including contraceptive management, long-acting reversible contraception, ultrasounds, pregnancy tests, lipid testing, hemoglobin screening, HIV testing, initial and annual gynecological examinations, breast exams, STI testing and treatment and colposcopy and LEEP procedures.

Women's Health Center of West Virginia hereby requests a response in writing within five (5) business days from the West Virginia Bureau of Medical Services indicating which, if any, specific provisions exist within its Revised Public Notice regarding West Virginia Constitutional Amendment 1, or any of its other existing rules and regulations, which would

prohibit or otherwise impact reimbursement for the women's health care services provided to our patients, as enumerated in the above paragraph. If such requested response is not received, this will be considered as an acknowledgment by the West Virginia Bureau for Medical Services that our understanding of the applicability of the Revised Public Notice and Amendment 1 is correct.

Thank you for your attention to this matter, and I look forward to your response.

Sincerely,

A handwritten signature in cursive script that reads "Sharon Lewis".

Sharon Lewis
Executive Director

Signore, Angela D

From: Sims, Ryan M
Sent: Tuesday, December 4, 2018 11:07 AM
To: info@wvomenshealthwv.org
Cc: Beane, Cynthia E (BMS); Atkins, Tony E
Subject: FW: Response to 11/28/2018 letter -- DRAFT IS THIS OK?
Attachments: 11-28-2018 Women's Health Center Correspondence.pdf

Importance: High

Ms. Lewis,

This email is a response to the attached November 28, 2018 correspondence. Please see below links with information regarding services which are reimbursable by WV Medicaid since the ratification of Amendment 1 took effect (and which services are reimbursable generally): Revised Public Notice Regarding West Virginia Constitutional Amendment 1; Change to WV Provider Manual section 519.19; WV Medicaid State Plan; and WV BMS Provider Manual.

<https://dhhr.wv.gov/bms/Public%20Notices/Pages/Public%20Notice%20regarding%20West%20Virginia%20Constitutional%20Amendment%201%20is%20now%20available.aspx>

<https://dhhr.wv.gov/bms/Public%20Notices/Pages/The-updated-version-for-Chapter-519-Practitioners-Services,-Section-519.19.4-Pregnancy-Termination-is-now-available.-.aspx>

<https://dhhr.wv.gov/bms/CMS/SMP/Pages/WV-State-Medicaid-Plan.aspx>

<https://dhhr.wv.gov/bms/Pages/Manuals.aspx>

Additionally, please note that any perceived failure by BMS to meet the artificial deadline as stated in your letter does not have the effect of granting Women's Health Center the ability to be reimbursed for any services beyond those services permissible under West Virginia's State Medicaid Plan, or otherwise have any legal effect whatsoever. Should you have any additional questions, please do not hesitate to contact me.

Regards,

Ryan M. Sims, JD

General Counsel

WV BMS and CHIP

Work (Direct): (304) 356-4909

Cell: (304) 542-5607

<http://www.dhhr.wv.gov/bms>

<http://www.dhhr.wv.gov/chip>

IMPORTANT NOTICE: This email is confidential, may be legally privileged, and is for the intended recipient only. Access, disclosure, copying, distribution, or reliance on any of it by anyone else is prohibited and may be a criminal offense. Please delete if obtained in error and email confirmation to the sender.



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**STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES**

Bill J. Crouch
Cabinet Secretary

**Bureau for Medical Services
Legal and Regulatory Services**
350 Capitol Street – Room 251
Charleston, West Virginia 25301-3706
Telephone: (304) 558-1700 Fax: (304) 558-1451

Cynthia E. Beane
Commissioner

December 14, 2018

Sent Via Electronic Mail:
ebaumwell@acluwv.org

Eli Baumwell
ACLU of WV Foundation
P.O. Box 3952
Charleston, WV 25339-3952

Mr. Baumwell,

On November 13, 2018, the West Virginia Department of Health and Human Resources, received via your request pursuant to the Freedom of Information ACT ("FOIA"), W.Va. Code §29B-1-1 *et seq.* requesting:

1. Any rule, policy, or guidance governing Medicaid funds for pregnancy terminations, prior to, and after the passage of the No Constitutional Right to Abortion Amendment ("Amendment 1")
2. The code, rules and internal regulations, policy, and guidance governing rule changes, including rule changes by ballot initiative and by court order.
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4. Any memoranda or communications regarding the manner and timeframe for changing rules, policies, or guidance regarding Medicaid funds for pregnancy termination.
5. Any legal memoranda, opinions, or findings that support an immediate revival of W. Va. Code § 9-2-11 following the passage of Amendment 1.
6. Any communications with legislators, legislative staff, the Governor, or Governor's staff regarding:
 - a. Medicaid funds for pregnancy termination services,
 - b. Senate Joint Resolution 12 (2018).
 - c. W.Va. Code § 9-2-11.
 - d. Amendment 1, or
 - e. The revival of statutes.

7. Any communications with outside lobbyists or special interest groups regarding the implementation of Amendment 1 and the revival of W.Va. Code § 9-2-11.

We are researching to determine any responsive documents that we may have regarding your request. We anticipate having a formal response to you no later than January 14, 2019.

We appreciate your patience. If you have any questions, please don't hesitate to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "Riley J. Romeo, Jr.", with a long horizontal flourish extending to the right.

Riley J. Romeo, Jr., Esq.
Deputy General Counsel
Bureau for Medical Services

RJR/as



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

Bill J. Crouch
Cabinet Secretary

Bureau for Medical Services
Office of Legal and Regulatory Services
350 Capitol Street – Room 251
Charleston, West Virginia 25301-3706
Telephone: (304) 558-1700 Fax: (304) 558-1451

Cynthia E. Beane
Commissioner

November 14, 2018

CERTIFIED MAIL: 91 7199 9991 7033 5146 7330

American Civil Liberties Union Foundation
Eli Baumwell, Policy Director
PO Box 3952
Charleston, WV 25339-3952

Dear Mr. Baumwell,

On November 13, 2018, the West Virginia Department of Health and Human Resources, received via your request pursuant to the Freedom of Information ACT ("FOIA"), W.Va. Code §29B-1-1 *et seq.* requesting:

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 - c. W.Va. Code § 9-2-11.
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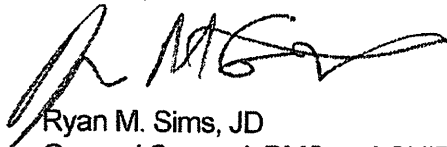
Eli Baumwell
November 14, 2018
Page 2

7. Any communications with outside lobbyists or special interest groups regarding the implementation of Amendment 1 and the revival of W.Va. Code § 9-2-11.

We are researching to determine any responsive documents that we may have regarding your request. We anticipate having a formal response to you no later than December 14, 2018.

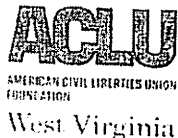
We appreciate your patience. If you have any questions, please don't hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Sims', with a stylized flourish at the end.

Ryan M. Sims, JD
General Counsel, BMS and CHIP

RS/jc



P O Box 3952
Charleston WV 25339-3952

(304) 345-9246
www.acluww.org

November 13, 2018

Via Electronic Mail & Fascimile

Secretary Bill Crouch
WV Department of Health and Human Resources
Attn: FOIA Request
One Davis Square, Suite 100 East
Charleston, WV 25301
(304) 558-1130 (f)
DHHRSecretary@wv.gov

Re: Freedom of Information Act Request

Secretary Crouch:

Pursuant to West Virginia Freedom of Information Act, W. Va. Code § 29B-1-1 *et seq.* ("FOIA"), the American Civil Liberties Union of West Virginia Foundation ("ACLU-WV") and the West Virginia Center on Budget and Policy ("WVCBP") requests the following materials and any related records. This request includes but is not limited to all records or communications preserved in electronic or written form, *including but not limited to* correspondence, data, directives, documents, videotapes, audio tapes, e-mail, **text messages**, faxes, files, guidance, guidelines, evaluations, instructions, **messages sent on social media platforms**, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, or studies. Please note that this request also includes a request for any communications sent using personal phones, email accounts, and social media accounts.¹ The date range for these requests, unless otherwise noted, is from June 1, 2017 to the present.

1. Any rule, policy, or guidance governing Medicaid funds for pregnancy terminations, prior to, and after the passage of the No Constitutional Right to Abortion Amendment ("Amendment 1").
2. The code, rules, and internal regulations, policy, and guidance governing rule changes, including rule changes by ballot initiative and by court order.
3. Any memoranda or communications regarding the changes to rules, policies, or guidance following the ruling in *Women's Health Center v. Panepinto* (446 SE 2d 658, 1993).

¹ Official records in the personal control of a government official are government records and subject to sunshine laws. See, e.g., *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145 (D.C. Cir. 2016) ("[A]n agency always acts through its employees and officials. If one of them possesses what would otherwise be agency records, the records do not lose their agency character just because the official who possesses them takes them out the door or because he is the head of the agency.")

3. Any memoranda or communications regarding the manner and timeframe for changing rules, policies, or guidance regarding Medicaid funds for pregnancy termination.
4. Any legal memoranda, opinions, or findings that support an immediate revival of W. Va. Code § 9-2-11 following the passage of Amendment 1.
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 - d. Amendment 1, or
 - e. The revival of statutes.
6. Any communications with outside lobbyists or special interest groups regarding the implementation of Amendment 1 and the revival of W. Va. Code § 9-2-11.

Please note that W. Va. Code § 29B-1-3 requires agencies to respond to requests for public records within **five business days**. If you anticipate that it will take longer than five business days, or have questions about the scope of this request, please call me at (304)-345-9246.

Additionally, while W. Va. Code § 29B-1-3(5) permits public agencies to assess fees associated with the reproduction of public records, as a not-for-profit advocacy organization we request a waiver of any fees associated with the furnishing of these documents. To limit costs, electronic production of documents would be preferable. If you do intend to assess fees, however, please contact me for authorization of any fees in excess of \$100.

West Virginia's Freedom of Information Act is "liberally construed with the view of carrying out" a policy of disclosure, while exemptions are to be narrowly construed. W. Va. Code §29B-1-1. Any party claiming that an exemption applies bears the burden of proving its applicability. See *Daily Gazette v. W. Va. Dev. Office*, 482 S.E.2d 180, 187 (W. Va. 1996). Documents regarding policies of public agencies after the policies have been formulated are not subject to the "internal memoranda or letters" exemption to the WV-FOIA provisions. See *id.* at 192. Finally, for any undisclosed or redacted records, we request a *Vaughn* index.

Thank you in advance for your prompt response. Please furnish all records to:

Eli Baumwell
ACLU of WV Foundation
P.O. Box 3952
Charleston, WV 25339-3952

If you have any questions or concerns, I can be reached at (304) 345-9246, ext. 104, or ebaumwell@acluwv.org.

Regards,

Eli Baumwell
Policy Director, ACLU-WV